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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

EDENTREE TECHNOLOGIES, INC., Plaintiff and Appellant, v. GALE TECHNOLOGIES, INC., et al., Defendants and Respondents.	H043620, H044269 (Santa Clara County Super. Ct. No. 113CV256120)

In 2008, respondent Gale Technologies, Inc. (Gale) entered into a written asset purchase agreement with appellant Edentree Technologies, Inc. (Edentree).[1] As part of the agreement, Gale purchased the majority of Edentree's assets, including its intellectual property, which included software called Lab Manager. In exchange, Gale agreed to issue Edentree 2.2 million shares of preferred stock that was to be placed in an escrow account and released in 18 months pending any claims for indemnification. In 2010, Gale filed a lawsuit against Edentree alleging that Lab Manager was defective, and Edentree had breached the asset purchase agreement. Gale requested the escrowed Gale stock be released back to Gale and claimed it was entitled to recover damages. Gale served Edentree the summons and complaint by delivering them to Edentree's registered agent for service of process, National Registered Agents, Inc. (NRAI). For unknown reasons, however, NRAI had in its database that Edentree's address was Gale's company

[1] Respondents Dell Marketing, L.P., DMLP Gamma Corp., and Dell, Inc., (collectively Dell) acquired Gale in 2012. We refer to Gale and Dell together as "respondents."

office. Thus, when NRAI served the summons and complaint on Edentree, it delivered the summons and complaint to Gale's office. Gale's chief financial officer (CFO) received the documents and placed them on his desk. On May 13, 2011, Gale obtained a default judgment against Edentree after it failed to respond to the lawsuit.

On November 14, 2013, Edentree filed a complaint against respondents Gale and Dell, alleging they had breached the asset purchase agreement. Respondents demurred to Edentree's complaint, arguing that the default judgment Gale had obtained against Edentree barred Edentree's claims. Edentree subsequently amended its complaint to add an additional cause of action for declaratory relief, alleging it had never received notice of Gale's prior action. A bifurcated court trial was held on the declaratory relief cause of action. Ultimately, the trial court ruled in respondents' favor on Edentree's cause of action for declaratory relief. The trial court sustained respondents' demurrer to Edentree's remaining causes of action without leave to amend and entered judgment in favor of respondents. The court also granted in part respondents' motion for attorney fees and costs.

Edentree has appealed both the judgment and the order granting attorney fees and costs.[2] On appeal, Edentree argues the court erred in finding in respondents' favor, because Gale's default judgment was fraudulently obtained. Edentree further argues the trial court erroneously declined to consider its proposed second amended complaint and erred when it denied its motion to reopen evidence. As we explain in detail below, we are bound by the standard of review and must affirm the judgment and the order granting attorney fees and costs.

[2] We ordered the two appeals consolidated for the purposes of briefing, oral argument, and disposition.

BACKGROUND

1. *The Asset Purchase Agreement*

On May 14, 2008, Gale, Edentree, and the Vechery Family Trust (VFT) entered into an asset purchase agreement. Gale agreed to purchase most of Edentree's assets, including its intellectual property, equipment, and furniture. In exchange, Gale agreed to deliver a promissory note to the VFT and to issue Edentree 2.2 million shares of preferred stock. The Gale stock was to be held in escrow as a security for Edentree's indemnification obligations as set forth in the agreement. Edentree agreed to indemnify Gale for any breach of representation or warranty made by Edentree. Jay Oyakawa, Edentree's president and chief executive officer (CEO) at the time, signed the asset purchase agreement on Edentree's behalf. Harvey Vechery signed on behalf of the VFT. The parties also executed a stock restriction agreement.

At the time the asset purchase agreement was signed, Edentree operated out of an office located in Newbury Park, California. According to a Gale office manager, Edentree's Newbury Park office was shut down sometime between May 2009 and December 2009.

2. *Gale's Request for Indemnification and NRAI's Change of Address*

On November 15, 2009, Gale sent Edentree and the VFT a claim notice pursuant to the asset purchase agreement based on Edentree's purported breach of representation and warranties. Gale asserted that Lab Manager, a software acquired under the asset purchase agreement, was defective. The notice was sent to Edentree at its Newbury Park office and to the VFT at an address in Irwindale, California. Thereafter, Gale did not release the 2.2 million shares of Gale stock in escrow to Edentree.

On September 30, 2010, Edentree's counsel, an attorney with Greenberg Traurig, sent Gale's counsel, Kevin Spreng of Robins, Kaplan, Miler & Ciresi LLP, a letter stating that Edentree had not been receiving stockholder notices or other information that Gale

may be disseminating to its stockholders. The letter noted that Edentree had changed its address and provided Gale's counsel with an updated address in Burbank.

3. *Edentree's Petition for Writ of Mandate to Compel Inspection of Gale's Records*

On October 29, 2010, Edentree filed a petition for writ of mandate seeking to compel inspection and copying of Gale's corporate books, records, and documents. The petition alleged Edentree was entitled to inspect Gale's records to determine the value of its Gale shares. On November 18, 2010, Gale filed an opposition to Edentree's petition. On November 22, 2010, Gale demurred to Edentree's petition.

4. *Gale's Lawsuit Against Edentree and The Default Judgment*

On November 8, 2010, Gale filed a complaint against Edentree and the VFT alleging causes of action for declaratory relief, breach of contract, and breach of the covenant of good faith and fair dealing. According to the complaint, Edentree had represented to Gale that Lab Manager was free from bugs, defects, and errors that would materially affect its use and functionality. However, after Gale purchased the software from Edentree, it began to receive complaints from customers over Lab Manager's performance. Gale had requested indemnification from Edentree for the costs it had incurred from attempting to correct the errors and "stabilize" Lab Manager. Edentree, however, had not indemnified Gale. Thus, Gale sought a judicial determination of its rights and obligations and a declaration that the 2.2 million Gale shares held in escrow be transferred back to Gale as indemnification for Edentree's breaches of representations and warranties under the asset purchase agreement. Gale also claimed Edentree had breached its contract and breached the covenant of good faith and fair dealing when it misrepresented that Lab Manager was free from defects.

At the time the 2008 asset purchase agreement was executed, NRAI was designated as Edentree's registered agent for service of process. At some point after the asset purchase agreement was executed, NRAI's records were changed to reflect

Edentree's address as Gale's office located in Santa Clara, California, and NRAI's invoices for Edentree were sent to Gale's address. According to information it provided to the California Secretary of State, Edentree, which was incorporated in Delaware, maintained NRAI as its registered agent up until 2013.

Thus, when Gale served the summons and complaint for its lawsuit on Edentree, it delivered the documents to Edentree's agent for service of process at the time, NRAI. NRAI, in turn, delivered the summons and complaint to the address it had on file for Edentree—which was listed as Gale's Santa Clara office. As a result, Gale's CFO, Kevin Rains, received copies of the summons and complaint that were addressed to Edentree. Rains was not aware if Edentree had been served using a different method, such as through a different address.

According to court records, Gale filed a notice of a related case, presumably Edentree's petition for a writ of mandate, in its lawsuit against Edentree. However, there is no record that it filed a notice of related case in Edentree's petition for writ of mandate that would have notified Edentree of Gale's lawsuit. Gale, however, alluded to its lawsuit in its opposition to Edentree's petition for a writ of mandate. In a footnote, Gale stated that "[t]he breach of those representations [made by Edentree in the asset purchase agreement] and warranties are the subject of another action."

Edentree never responded to Gale's lawsuit. Subsequently, on February 7, 2011, Gale requested entry of default judgment against Edentree in the amount of $2.2 million. The request for entry of default judgment was again served on NRAI. Gale voluntarily dismissed the VFT as a defendant to its action. In its case management conference prior to the VFT's dismissal, Gale noted it had not served the VFT but that service may be unnecessary if a default judgment was entered against Edentree. On May 13, 2011, judgment was entered in favor of Gale. The court determined Edentree's Lab Manager software was defective, Gale had sustained damages, and the escrowed assets transferred

under the asset purchase agreement should be returned to Gale. The judgment was served on NRAI.

5. *Edentree's Dismissal of Its Petition for Writ of Mandate and The Correspondence Between Gale and Edentree's Attorneys*

Around the time Gale sought entry of a default judgment against Edentree in its lawsuit, Gale continued to be in contact with Edentree's attorneys with respect to Edentree's petition for writ of mandate. On February 18, 2011, after Gale had requested entry of a default judgment against Edentree, Gale's attorney communicated with Edentree's attorney about a possible buyback of Gale's stock. In an e-mail, Gale's attorney noted its client remained "interested in discussing a buyback," and the Gale "shares are the source of indemnity for those claims [breaches of the representations and warranties] if a deal cannot be struck, and that is the reason they [had] not been released from escrow." On March 8, 2011, Gale's attorney e-mailed Edentree's attorney and told him he needed to run calculations to determine the damages caused by the defects in Edentree's Lab Manager software. By that time, Gale had already requested a default judgment and damages in the amount of $2.2 million. In April 2011, Edentree dismissed its petition for writ of mandate.

6. *Edentree's Corporate Status*

Edentree was incorporated in Delaware in 2002. By March 1, 2010, Edentree was no longer in good standing and had become inoperative in Delaware due to its failure to pay taxes. Its status in California was listed as "FTB FRFT" as of December 1, 2010, meaning "[t]he entity's powers, rights and privileges were suspended or forfeited in California by the FTB [(Franchise Tax Board)] for failure to file a return and/or failure to pay taxes, penalties or interest."

According to Vechery, Edentree's current CEO and president, Edentree had no officers or directors between June 1, 2008 and December 7, 2009. During that same time frame, Edentree also had no employees.

7. *Dell's Acquisition of Gale*

In November 2012, Dell acquired Gale. Edentree did not receive any compensation from Dell for the acquisition.

8. *Edentree's Lawsuit Against Gale*

a. **The Complaint, First Amended Complaint, and Respondents' Demurrers**

On November 14, 2013, Edentree filed a lawsuit against respondents alleging causes of action for breach of contract, negligent misrepresentation, conversion, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. According to Edentree's complaint, Dell had purchased Gale for $70 million in 2012 while Gale and Edentree were disputing the alleged defects in Edentree's Lab Manager software. Edentree claimed that following its sale, Gale breached the asset purchase agreement, because Edentree was entitled to Gale stock and Gale had failed to require Dell to issue stock shares to Edentree as compensation following the acquisition. Respondents demurred to the complaint.[3]

On January 28, 2014, Edentree filed a first amended complaint alleging the same initial four causes of action and an additional fifth cause of action for declaratory relief. In its cause of action for declaratory relief, Edentree alleged respondents had claimed in their demurrer that res judicata and collateral estoppel applied because of the default judgment that was entered in Gale's earlier lawsuit against Edentree. Edentree, however, insisted it had never received notice of Gale's lawsuit and was never properly served with any of the documents filed in Gale's lawsuit. Edentree asserted it had realized a

[3] Respondents' demurrer to Edentree's complaint is not a part of the record on appeal.

judgment had been entered against it only when it filed the instant lawsuit against respondents and respondents demurred. Thus, Edentree sought a declaration that Gale's judgment against it had no legal force or effect.

On March 5, 2014, respondents again demurred to Edentree's first amended complaint, arguing again that Edentree's claims were barred by res judicata and collateral estoppel in light the default judgment entered in Gale's favor.

b. **Stipulation for a Bifurcated Trial on The Declaratory Relief Cause of Action**

On April 17, 2014, the trial court held a hearing on Edentree's complaint. During the hearing, the court remarked that it believed that if Edentree did not prevail on its fifth cause of action for declaratory relief, the doctrines of res judicata and collateral estoppel would bar its other four causes of action. Thus, to expedite the case, the court proposed holding a bifurcated court trial on the fifth cause of action. The court and the parties agreed evidence could be presented by deposition or declarations. The court, however, clarified that the parties would have the right to demand that anyone who submits a declaration be cross-examined.

On September 24, 2014, Edentree's attorney signed a stipulation covering the briefing schedule and trial procedure for the bifurcated trial on its fifth cause of action for declaratory relief on behalf of Edentree. Respondents' attorney signed the stipulation the following day. According to the stipulation, the court was to decide the merits of Edentree's declaratory relief cause of action following the hearing, and the parties' briefs could be supported by affidavits, declarations, answers to interrogatories, depositions, discovery materials, and other materials subject to judicial notice.

c. **Pretrial Discovery**

As part of the discovery process, the parties deposed an employee of CT Corporation System, which had acquired NRAI in 2011. During the deposition, the

employee explained the records reflected Edentree's address was changed in its system to Gale's office address, but the records did not indicate who had made the change and when the change was made. According to the employee, there were records that on some occasions Edentree's mail was returned to NRAI with a label that read "Unofficial—Mail Returned For Better Address."

Several Gale employees submitted declarations attesting they never instructed NRAI to deliver materials meant for Edentree to Gale at its Santa Clara address, and they had no knowledge of any other Gale personnel taking such action. Edentree also requested records from Federal Express to determine where mail had been sent.

On October 10, 2014, Edentree filed an opening brief and submitted evidence for its declaratory relief cause of action. Edentree submitted declarations, including declarations from Vechery and Robert Adel, an attorney with Greenberg Traurig, the law firm that represented Edentree in its petition for writ of mandate. Vechery attested that Edentree had no officers, directors, or employees between June 1, 2008 and December 7, 2009, and he had previously been in contact with Gale's CFO, Kevin Rains, in December 2010. However, Rains never mentioned Gale's lawsuit against Edentree in any of his communications with Vechery. Vechery declared he was the only person with the authority to instruct NRAI to change Edentree's forwarding address, but he never instructed NRAI to change Edentree's forwarding address to Gale's Santa Clara office. Moreover, Vechery asserted he never received any documents from NRAI pertaining to Gale's lawsuit.

Adel's declaration stated that he represented Edentree for its petition for writ of mandate and was in contact with Gale's attorneys during that time. At no point did Gale's attorneys inform him that they had filed a lawsuit against Edentree. Moreover, on September 30, 2010, he had sent Gale an updated address for Edentree.

Jay Oyakawa, Edentree's former CEO, stated in a declaration that he stopped being Edentree's CEO in May 2008. According to Oyakawa, he never authorized NRAI to change its forwarding address for Edentree to Gale's Santa Clara office.

Edentree also submitted a declaration prepared by Rains, Gale's CFO. Rains was Gale's CFO until around November 2012. Rains explained he had received a package that was addressed to Edentree that contained documents pertaining to Gale's lawsuit against Edentree, and he had placed those documents on a stack on his desk. He never forwarded the documents to Edentree. Jacqueline Bourgeois, a former executive assistant and administrator at Gale, submitted a declaration stating that when Gale received mail addressed to Edentree concerning litigation between Gale and Edentree, she would give the mail to Rains. According to Bourgeois, at least a "portion" of the mail she handed to Rains concerning the litigation was placed on a stack on his desk, and the stack remained on Rains's desk until November 2013.

In October 2014, respondents filed their own briefs on the matter, attaching several declarations. Respondents submitted declarations by Gale employees attesting they never instructed NRAI to deliver materials meant for Edentree to Gale at its Santa Clara office. Respondents also submitted their own declaration prepared by Rains, who reiterated that he received the documents related to Gale's lawsuit against Edentree but clarified that he had no information or belief that Edentree was not also receiving the documents in some other way (i.e., at a different address or by electronic delivery, fax, or some online portal).

Respondents also submitted a declaration prepared by Nariman Teymourian, the former president and CEO of Gale. Teymourian stated he was involved with the negotiations with Dell when Dell acquired Gale, and Edentree's Lab Manager software had nothing to do with Dell's acquisition of Gale or its evaluation of Gale's worth.

On November 7, 2014, the parties appeared at a pretrial conference to discuss the scope of the court trial on the bifurcated declaratory relief cause of action. The parties initially indicated the trial would take approximately half a day, with several witnesses being called. The court told counsel it would not be able to hear the matter if the trial took that long, and the matter would have to be assigned to a trial department. Subsequently, Edentree's counsel suggested condensing the process by proceeding through declarations, depositions, and documentary evidence in lieu of live testimony so the court could handle the trial. A written stipulation was prepared memorializing the agreed-upon trial process. The stipulation indicated that Greenberg Traurig, Edentree's former counsel, had responded to Edentree's trial subpoena with a motion to quash.

d. **The Bifurcated Court Trial**

On November 20, 2014, the trial court held the bifurcated court trial on Edentree's cause of action for declaratory relief. The court reiterated to the parties that it was proceeding pursuant to the parties' stipulation solely through declarations, depositions, and other documentary evidence. All counsel, including Edentree's counsel, indicated they were authorized to agree to the stipulated procedure on their clients' behalf. Counsel stated that in general, they did not have any issues with the credibility of the witnesses who had submitted declarations, and they were ready to proceed with argument. Respondents' counsel noted he believed there were some credibility issues with Vechery's statement that Edentree had no officers, directors, or employees between May 2008 to December 2009, but that fact was not materially relevant to the court's consideration of Edentree's cause of action for declaratory relief.

After hearing argument, the court indicated it was inclined to give Edentree the opportunity to file a declaration to establish that it would have had a meritorious defense to Gale's lawsuit. Subsequently, Edentree submitted a declaration and attached exhibits

outlining its defenses to Gale's lawsuit. Respondents objected to Edentree's introduction of additional evidence.

e. **The Tentative Decision**

On March 23, 2015, the trial court issued a tentative decision on Edentree's fifth cause of action for declaratory relief. In its tentative decision, the court noted that Edentree could no longer seek statutory relief from default, because the statute of limitations had expired. However, the court stated that Edentree was permitted to seek equitable relief from default on the grounds of extrinsic fraud or mistake.

The court, however, concluded that Edentree failed to meet its burden to demonstrate either extrinsic fraud or mistake. The court determined that evidence did not support Edentree's theory that Gale instructed NRAI to change Edentree's address to Gale's Santa Clara office. Moreover, the court found that Edentree itself had neglected to inform its own agent for service of process, NRAI, that it had moved from its Newbury Park office and had failed to provide NRAI a current address. The court further noted that "[e]ven if Gale's counsel violated a[n] . . . ethical moral code by failing to notify Edentree's counsel in a separate pending matter that a complaint had been served and [a] default entered, Gale's counsel was under no legal obligation to do so, and setting aside a default is not warranted under applicable case law." Thereafter, the court found in respondents' favor and against Edentree for its cause of action for declaratory relief.

f. **The Objection to the Tentative Decision**

On June 3, 2015, Edentree substituted in new counsel. Edentree's new counsel filed objections, dated June 8, 2015, to the trial court's tentative decision on Edentree's cause of action for declaratory relief. Edentree supported its objections with two additional declarations, a new declaration prepared by Vechery and a declaration prepared by Joseph Nicosia, the CFO for Key Brands International, Ltd., where Vechery presently worked as the president and CEO.

In Vechery's new declaration, he stated he had never agreed to stipulate to the bifurcated court proceedings on behalf of Edentree and had never agreed to stipulate to a trial based on declarations rather than live testimony. Vechery asserted that in 2009, Gale submitted a formal claim notice under the asset purchase agreement and addressed that claim to the same address as Key Brands International, located in Irwindale, California. Thus, Vechery insisted that Gale knew the only active address for Edentree and for the VFT was located in Irwindale. Moreover, Vechery described that Edentree had previously sent Gale a notice of an address change pursuant to the asset purchase agreement when it requested stockholder notices. Thus, Vechery declared Gale knew of at least two valid addresses for Edentree, yet it failed to send the summons and complaint to these correct addresses.

Vechery's declaration further asserted he knew that Gale purposefully concealed its lawsuit from Edentree, explaining that "Edentree understands that Rains [Gale's CFO] told Horwitz [Edentree's trial counsel] that Rains told Geibelson [Gale's attorney] that Rains had received legal documents in the Gale Matter that were addressed to Edentree and that Geibelson told Rains not to send the legal documents to Edentree or to me on behalf of Edentree."

In Nicosia's declaration, he confirmed the statements in Vechery's new declaration were true and correct. Moreover, he described that Vechery had requested that he collect correspondence between Edentree's counsel and Gale's counsel, and he had prepared a chart outlining the correspondence at Vechery's request.

Edentree attached the documents referenced in Nicosia's and Vechery's declarations to its objections, including the correspondence between Gale's attorneys and Edentree's former attorneys, a timeline of Gale's lawsuit that purportedly showed Gale purposefully obtained the default judgment while concurrently communicating with

Edentree about its petition for writ of mandate, and letters and documents indicating that Gale should have known that Edentree's address had changed.

Respondents opposed Edentree's objections, arguing that the matter had been submitted and the new evidence should not be admitted.

g. **Motion to Reopen Evidence**

On July 10, 2015, Edentree filed a motion to reopen the evidence for the bifurcated court trial. Edentree reiterated that its prior counsel had not obtained its consent to proceed with the bifurcated court proceeding without live testimony. Edentree's new counsel asserted he was prepared to litigate the matter with live testimony and the opportunity to conduct cross-examination of witnesses. Edentree also insisted it had presented competent new evidence that was relevant to the proceedings.

Following a hearing, the court denied Edentree's motion to reopen evidence. The court found the bifurcated court trial proceedings were expressly stipulated to by the parties. Moreover, the court concluded the new evidence Edentree sought to introduce was and had always been in Edentree's counsel's control. The court stated the only explanation for Edentree's failure to introduce the evidence at the bifurcated court trial was that its former trial counsel had made certain strategic decisions, which did not warrant reopening the evidence and retrying the issues. The trial court also determined Edentree's substantial rights were not impaired by the trial procedures stipulated to by the parties.

h. **The Demurrer, Final Decision on The Bifurcated Court Trial, and Final Decision on The Demurrer**

On June 30, 2015, respondents filed additional papers in support of its demurrer to Edentree's first amended complaint. Edentree opposed the demurrer and requested leave to amend its first amended complaint to add additional claims and allegations. Edentree argued it would amend its complaint to allege that Gale breached its obligations under the

asset purchase agreement and that Gale fraudulently obtained the default judgment against Edentree.

On January 8, 2016, the trial court issued its final decision and findings after the bifurcated court trial on Edentree's fifth cause of action for declaratory relief. In its final decision, the court sustained respondents' objections to the additional declarations prepared by Vechery and Nicosia, overruled Edentree's objections to respondents' evidence, and determined Edentree's objections to the tentative decision were meritless. Otherwise, the court's final decision was largely the same as its tentative decision, finding in respondents' favor.

Following the final decision on the bifurcated trial, the parties filed additional briefs with respect to respondents' demurrer to Edentree's first amended complaint. In arguing against the demurrer, Edentree again insisted it should be permitted to amend its complaint. Specifically, Edentree argued it would be able to amend its complaint to include: "(1) allegations that Gale breached its obligations under the [asset purchase agreement], including Section 9.2 thereof, by failing to provide actual notice of the prior action against Edentree, at the address provided by Edentree, (2) allegations based on the Edentree Objections or Edentree's Further Evidence, (3) an abuse of process claim based on Gale's non-communicative conduct, not subject to any litigation privilege, by which Gale obtained the Fraudulent Judgment while precluding Edentree from receiving actual notice of the prior action, (4) express allegations of extrinsic fraud or extrinsic mistake with respect to the Fraudulent Judgment, to the extent the Final Decision does not negate such allegations, and (5) any other appropriate causes of action based on Gale's misconduct with respect to the Gale Stock, Edentree's rights thereto, and the Fraudulent Judgment."

On March 9, 2016, after the trial court issued its tentative ruling granting respondents' demurrer, Edentree lodged a proposed second amended complaint.

The second amended complaint alleged a total of 17 causes of action, including new causes of action for intentional and negligent misrepresentation, abuse of process and conspiracy to abuse process, breach of fiduciary duty, constructive trust, concealment, unfair business practices, slander of title, quiet title, accounting, and recovery of personal property. At the hearing contesting the tentative decision, Edentree urged the court to consider its proposed second amended complaint. When asked why it had not filed the second amended complaint earlier, Edentree's counsel explained that it had not done so because an amended complaint would have been unnecessary had the court overruled respondents' demurrer.

On March 24, 2016, the court issued its order on respondents' demurrer to Edentree's first amended complaint. In its order, the court determined Edentree's first through fourth causes of action were precluded by the default judgment entered in favor of Gale in its earlier lawsuit. The court further struck Edentree's proposed second amended complaint as improper, finding there had been an unwarranted delay in filing the proposed complaint and that permitting the late filing would substantially prejudice respondents and the court. Moreover, the court determined the numerous new causes of action in Edentree's proposed second amended complaint were largely derived from the same issues litigated in the bifurcated court trial on the declaratory relief cause of action. Thus, the court concluded that "Edentree's shifting legal theories in an attempt to create a claim based on the same facts at this late date do not overcome its lack of diligence in presenting these theories at trial." Subsequently, the court sustained respondents' demurrers to Edentree's remaining causes of action in its first amended complaint without leave to amend. Judgment was entered in respondents' favor on April 15, 2016.

On August 16, 2016, the trial court, after considering respondents' motion for attorney fees and accompanying memorandum of costs, determined it was appropriate to award respondents a total of $294,690.50 in attorney fees. The court, however, denied

respondents' motion for nonstatutory costs, finding respondents failed to itemize the claimed costs and specially plead and prove the costs at trial.

DISCUSSION

On appeal, Edentree argues the court erred when it entered judgment in respondents' favor, because Gale obtained its default judgement against Edentree in its earlier action by extrinsic fraud. Edentree further argues the court erroneously denied its motion to reopen the evidence following the bifurcated court trial proceedings and it erroneously declined to consider its proposed second amended complaint. Lastly, Edentree argues the trial court's order on fees should be reversed.

1. *Respondents' Appendix*

Before we address the merits of Edentree's arguments, we first address its claims pertaining to respondents' appendix. After Edentree filed its opening brief in this appeal, respondents filed a two volume respondents' appendix. In its reply brief, Edentree objects to respondents' appendix, arguing that it contains documents unnecessary for proper consideration of the issues and documents that were filed with the trial court while this appeal was already pending.

Under California Rules of Court, rule 8.124(b)(3)(A), an appendix "must not . . . [c]ontain documents or portions of documents filed in superior court that are unnecessary for proper consideration of the issues." Thus, to the extent some of respondents' appendix duplicate items from appellant's appendix, they are unnecessary for our review, and we decline to consider them. We also decline to consider any documents in respondents' appendix that were filed with the trial court while this appeal was pending that are irrelevant to our analysis of the issues raised by the parties.

2. *The Default Judgment Against Edentree*

Edentree argues the trial court erred when it did not grant its requested declaratory relief. Edentree insists the evidence it submitted established Gale fraudulently obtained

the default judgment by concealing the existence of its lawsuit and failing to provide Edentree with effective notice. As we explain in detail below, we find Edentree's arguments to be meritless.

a. **Overview and Standard of Review**

A court has the inherent authority to set aside a default judgment based on nonstatutory, equitable grounds "if it has been established that extrinsic factors have prevented one party . . . from presenting his or her case." (*In re Marriage of Park* (1980) 27 Cal.3d 337, 342 (*Park*).) If a "party can show that extrinsic fraud or mistake exists, such as a falsified proof of service . . . a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts." (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181.) In addition to a motion, a party may file an independent action in equity, and "[a] court of general jurisdiction has inherent equity power, aside from statutory authorization, to vacate and set aside default judgments obtained through extrinsic fraud or mistake." (*Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 146.)

"Extrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been 'deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense.' " (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471.) The term "extrinsic mistake" has been broadly applied to encompass "circumstances extrinsic to the litigation [that has] unfairly cost a party a hearing on the merits." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) "In contrast with extrinsic fraud, extrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present." (*Manson, Iver & York v.*

Black (2009) 176 Cal.App.4th 36, 47.) In cases involving either extrinsic fraud or mistake, relief will not be granted "where it is shown that the party requesting equitable relief has been guilty of inexcusable neglect or that laches should attach." (*Park, supra*, 27 Cal.3d at p. 345.)

"When a default *judgment* has been obtained, equitable relief may be given only in exceptional circumstances. '[W]hen relief under section 473 is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period there is a strong public policy in favor of the finality of judgments and only in exceptional circumstances should relief be granted.' " (*Rappleyea, supra*, 8 Cal.4th at pp. 981-982.) Thus, a stringent test applies to determine if a party qualifies for equitable relief from a default judgment: " 'First, the defaulted party must demonstrate that it has a meritorious case. Second[], the party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action. Last[], the moving party must demonstrate diligence in seeking to set aside the default once . . . discovered.' " (*Id*. at p. 982.)

We review the court's conclusion that Edentree was not entitled to declaratory relief on the ground that Gale obtained its default judgment by extrinsic fraud for an abuse of discretion. (*Rappleyea, supra*, 8 Cal.4th at p. 981.) On review, we may not substitute our judgment for that of the trial court and must defer to the trial court's express or implied findings if they are supported by substantial evidence. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1143.)

b. **The Court Did Not Abuse Its Discretion by Denying Edentree Equitable Relief**

Edentree argues the court erroneously concluded that it was not entitled to a judicial declaration that the default judgment obtained by Gale is void. Edentree focuses

its argument not on whether Gale obtained the judgment by mistake, but whether it obtained the judgment by fraud.

In its opening brief, Edentree recounts the evidence supporting its position that Gale fraudulently obtained the default judgment. Edentree argues the evidence establishes that Gale purposefully kept the papers delivered by NRAI that were addressed to Edentree away from Edentree and knew it was not providing actual, constructive service to Edentree when it served the papers on NRAI. For example, Edentree insists that Gale handled the invoices sent to Edentree by NRAI that were forwarded to Gale's address, and Gale knew that Edentree's Newbury Park office was closed after Gale acquired the majority of Edentree's assets. Edentree also claims that Gale deliberately ignored its own previous communications with Edentree, including when it sent Edentree a claim notice under the asset purchase agreement to a different address and *not* to NRAI.

Moreover, Edentree argues that Gale took constructive steps to limit Edentree's awareness of the lawsuit. Edentree notes that Gale did not file a notice of related action in Edentree's petition for writ of mandate as required under California Rules of Court, rule 3.300, which would have notified Edentree of Gale's lawsuit. Edentree further insists that Gale dismissed the VFT from its lawsuit in an effort to conceal the matter from Edentree, because it knew that serving the summons and complaint on the VFT would have alerted Edentree of the action. Lastly, Edentree claims that Gale's counsel deliberately failed to inform Edentree's attorneys about the pending lawsuit even though they were in contact with each other over different matters.

We agree with Edentree that the evidence outlined in its briefs supports an inference that Gale deliberately concealed the action from Edentree. Edentree's appellate arguments, however, are focused on attacking the evidence submitted by Gale and arguing that the trial court erred when it made contrary inferences. As the reviewing court, that is not our role; we do not reweigh evidence and must instead defer to the trier

of fact's express or implied findings. (*Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514.) Even where the evidence is not in conflict, but conflicting reasonable inferences can be drawn from the facts, we must defer to the trial court's choice among the conflicting reasonable inferences. (*Winograd v. American Broadcasting Co*. (1998) 68 Cal.App.4th 624, 633-634.)

Here, the trial court drew an inference from the evidence that Gale did not deliberately conceal the action, and we believe that inference was reasonable. Rains, Gale's CFO, prepared a declaration acknowledging he received papers regarding Gale's lawsuit against Edentree. Rains also asserted he had no knowledge that Edentree was not receiving the documents by some alternative method—for example, at a different address, by fax, or through an online portal. Several different Gale employees submitted declarations attesting that they did not change Edentree's address with NRAI to Gale's Santa Clara office.[4] The evidence thus supports the inference that even though Gale received the summons and complaint addressed to Edentree from NRAI, Gale did not know that Edentree did not have actual notice of the action.

The fact that Gale's counsel did not affirmatively notify Edentree's counsel of the pending lawsuit also does not conclusively demonstrate that Gale concealed the lawsuit or otherwise knew Edentree did not have actual notice of the lawsuit. As the trial court noted in its final decision, the obligation to warn opposing counsel before taking a default judgment is an *ethical* obligation, not a legal one. Courts have held that " ' "[w]hile as a matter of professional courtesy counsel should have given notice of the impending

[4] As we discuss in a later section of the opinion, Edentree argues that it had additional evidence that demonstrated Gale deliberately concealed the action from it. In a second declaration, Vechery asserted that he knew that Rains was told to not forward the summons and complaint to Edentree. This evidence, however, was not submitted before the bifurcated court trial; it was submitted in connection with Edentree's objections to the tentative decision following the bifurcated court trial and the motion to reopen evidence.

default, and we decry this lack of professional courtesy . . . , counsel was *under no legal obligation* to do so." ' " (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 701-702; *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038.) We are similarly concerned that Gale's counsel did not advise opposing counsel before taking the default and find this action was lacking in professional courtesy and was not consistent with our expectations of members of the bar practicing in our courts. Nonetheless, we do not believe it was an abuse of discretion for the court to conclude that Gale's counsel's failure to inform Edentree's counsel of the default did not amount to fraud.

Edentree outlines several findings made by the trial court after the bifurcated court trial that it claims demonstrates the court misconstrued the evidence and Edentree's arguments. First, Edentree claims the trial court's statement that Edentree did not argue that Gale's service on its designated agent for service of process was invalid was incorrect and superfluous. Edentree insists that it does not matter that service on a corporation's registered agent is *typically* valid, because it argues here that service on NRAI was invalid since Gale knew it would not give Edentree actual notice.

We disagree with Edentree's assessment of the trial court's statement. In its own words, Edentree does *not* argue that Gale's service on its designated agent was on its face legally ineffective. If it did, we would find that argument to be without merit. (See Code Civ. Proc., § 416.10, subd. (a) [summons may be served on a corporation by delivering a copy of the summons and complaint to the person designated as agent for service of process].) The trial court's statement is thus *factually* correct, and we do not believe it demonstrates the court misconstrued Edentree's argument. Moreover, we do not believe the finding was erroneous. Since Edentree did not argue that service on NRAI was legally invalid, its failure to demonstrate that Gale's service on NRAI was fraudulent undermines its claim that it was otherwise entitled to equitable relief due to extrinsic fraud.

Next, Edentree takes issue with the court's statements that Edentree did not assert that Gale should have sent the summons and complaint to Edentree's former business address in Newbury Park and its conclusion that Edentree did not establish that Gale employees are the ones who changed Edentree's address with NRAI. Edentree opines that its argument does not rest on whether Gale should have sent the summons and complaint to a different address or whether Gale employees were the ones who changed its address with NRAI. Rather, Edentree argues fraud is demonstrated by Gale's *knowledge* that service on NRAI would not give Edentree actual notice and Gale's *knowledge* of alternative ways to deliver the summons and complaint to Edentree that would have given it actual notice.

Contrary to Edentree's arguments, we believe the trial court's final order following the bifurcated hearing demonstrates it understood Edentree's claims and rejected them. In its order, the trial court stated that there was insufficient evidence for it to conclude that Gale deliberately kept Edentree in ignorance of the lawsuit. In other words, the court held that Edentree failed to demonstrate that Gale *knew* that serving NRAI with the summons and complaint would not notify Edentree of the action. The court's finding is supported by the evidence. As we previously noted, Rains stated he had no way of knowing whether NRAI sent the same pleadings to Edentree at some other address or through some other means. Moreover, even assuming Gale knew of other valid addresses where Edentree accepted mail (such as the Irwindale address where Gale had previously sent a claim notice under the asset purchase agreement to the VFT or the Burbank address where Edentree had directed Gale to send stockholder notices), Gale's knowledge of these alternative addresses does not conclusively establish that Gale must have known that service on NRAI would be ineffective.

Edentree cites to *Grappo v. McMills* (2017) 11 Cal.App.5th 996, 1012 and argues that default judgments should be entered only if a plaintiff has followed certain

procedures to ensure a defendant has received sufficient notice. Edentree claims that Gale failed to take adequate steps to ensure Edentree received notice of the lawsuit, and in fact deliberately concealed the matter. Edentree's reliance on *Grappo* is misplaced. Gale followed procedures that were designed to provide Edentree with sufficient notice. Gale served the summons and complaint on NRAI, the company that Edentree *itself* designated as its agent for service of process. Gale was not required to do more than what was required and serve Edentree multiple times through alternative methods.

Lastly, Edentree notes that there is a strong policy argument supporting vacating a default and permitting a party to present its case in court. We agree, but we also reiterate that there is a strong policy argument *against* granting equitable relief in favor of the finality of judgments in circumstances when a default *judgment* has already been obtained, which is the case here. (*Rappleyea, supra,* 8 Cal.4th at pp. 981-982.) Several years have passed since the entry of the default judgment against Edentree; thus, the finality of the judgment weighs against granting equitable relief.

Based on the foregoing, we conclude the trial court did not abuse its discretion when it determined Edentree was not entitled to equitable relief on the basis that Gale's default was obtained by extrinsic fraud.

c. The Trial Court Did Not Abuse Its Discretion by Concluding Edentree's Neglect Was Inexcusable

The trial court also concluded that Edentree's inexcusable neglect rendered it ineligible for equitable relief. As we previously discussed, equitable relief should not be granted if the default was the result of the inexcusable neglect of the party requesting the relief. (*Park, supra,* 27 Cal.3d at p. 345.)

Edentree, however, argues that its failure to change the designation of NRAI as its registered agent for service of process or maintain a current address with NRAI does not amount to "material negligence" excusing Gale's deliberate fraud. Citing *Weitz v.*

Yankosky (1966) 63 Cal.2d 849, Edentree argues that even if the default was "caused by *some* negligence on [its] part, this negligence might be excused if it in no way prejudiced the opposing party." (*Id*. at p. 856.) Edentree claims that Gale was not prejudiced by its failure to update its agent with the Secretary of State, because Gale knew how to get in touch with Edentree and had in its possession addresses that would have provided Edentree with actual notice of the lawsuit.

Edentree, however, mistakes *excusable* neglect with *inexcusable* neglect, which bears on whether it is entitled to equitable relief. Here, the trial court found that Edentree's neglect was inexcusable. Neglect is excusable if " 'the acts which brought about the default [are] the acts of a reasonably prudent person under the same circumstances.' " (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58.) Examples of excusable neglect include instances where the defendant was seriously ill or unable to understand he or she was being served with process (*Kesselman v. Kesselman* (1963) 212 Cal.App.2d 196, 207-208) or if the defendant's attorney erroneously relied on an agreement made with the plaintiff's attorney that there would be an extension to filing a response to the complaint. (*Ron Burns Construction Co., Inc. v. Moore* (2010) 184 Cal.App.4th 1406, 1414-1416, disapproved of on a different ground as stated in *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830.)

We believe the trial court's conclusion that Edentree's neglect was inexcusable is reasonable. Edentree, which is a Delaware corporation, is a foreign corporation in California. Under California law, a foreign corporation that transacts in intrastate business must file with the Secretary of State a form providing, among various things, the name of an agent upon whom process directed to the corporation may be served within the state *and* its "irrevocable consent" to service of process directed to it upon the designated agent. (Corp. Code, § 2105, subd. (a)(5), (a)(6)(A).) As a foreign

corporation, Edentree was also required to file an amended statement with the Secretary of State whenever its agent or service of process has changed. (Corp. Code, § 2107, subd. (b).)

Thus, Edentree was required to maintain updated records with the Secretary of State if it wanted to engage in business in California. Yet, inexplicably, Edentree's records with NRAI were changed, and Edentree never updated its registered agent with the Secretary of State to list the addresses that it now claims would have been valid. Vechery himself confirmed in his initial declaration that he was the *only* individual authorized to change Edentree's address with NRAI. At the same time, multiple Gale employees submitted declarations denying having changed Edentree's address or knowing anybody within Gale who changed Edentree's address. As a result, it was not unreasonable for the court to conclude that Edentree's failure to update or maintain its designated agent for service of process—whose sole function is to receive summons and complaints on Edentree's behalf—were not the actions of a reasonably prudent person.

Edentree argues the trial court erroneously relied on *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, and *Manson, Iver & York v. Black, supra,* 176 Cal.App.4th 36 and distinguishes each of these cases in its opening brief. Edentree, however, misinterprets the trial court's decision. The court did not state that these cases are factually analogous to the situation contemplated here. Rather, the court cited to these three cases for the general proposition that relief from default should be denied if a party's negligence permitted the default. In other words, equitable relief is not warranted when the default occurred due to the party's *inexcusable* neglect. We see no reason why this general proposition is inapplicable here.

In its decision, the trial court cited to *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488. Edentree claims the trial court's reliance on *Cruz* is misplaced. In *Cruz,* the appellate court concluded the plaintiff was not entitled to equitable relief from

default based on extrinsic mistake, because the record merely established that an internal mistake prevented it from learning of the lawsuit. There, someone who was authorized to receive mail on behalf of the company had signed the return receipt for the summons and complaint. (*Id*. at p. 504.) Edentree distinguishes *Cruz*, arguing that *no* Edentree employee was served with the summons and complaint in Gale's lawsuit. Moreover, a *Gale* employee acknowledged that she received the papers addressed to Edentree.

Although we agree with Edentree that *Cruz* is factually distinguishable, Edentree still has not demonstrated the court abused its discretion in finding it was not entitled to equitable relief. *Cruz* did not contemplate the factual circumstances that are present here: an attempt was made to serve the designated agent for service of process but the requisite papers were delivered to the wrong address. "It is axiomatic that cases are not authority for propositions that are not considered." (*California Building Industry Assn. v. State Water Resources Control Bd*. (2018) 4 Cal.5th 1032, 1043.) The fact that the situation contemplated in *Cruz* failed to justify equitable relief does not mean that the situation contemplated here warrants such relief.

Lastly, Edentree insists the laws governing service of process on foreign corporations were intended to protect corporations from default judgments, citing to *Oro Navigation Co. v. Superior Court* (1947) 82 Cal.App.2d 884, 889 (*Oro Navigation*). Thus, Edentree argues that allowing the default judgment to stand would contravene the laws' statutory purpose.

Edentree's assessment is flawed. As stated in *Oro Navigation*, the laws governing service of summons on foreign corporations has *two* purposes. The first purpose, as stated in *Oro Navigation*, is to give aggrieved parties a means of "bringing a foreign corporation into a proper jurisdictional tribunal." (*Oro Navigation*, *supra*, 82 Cal.App.2d at p. 889.) The *second* purpose is to provide security for foreign corporations from default judgments. (*Ibid*.) Both purposes are served only if foreign corporations comply

with their legal obligations to update their designated agents of service of process. Doing so permits effective service on foreign corporations and prevents default judgments from being erroneously taken. Edentree's own failure to maintain proper records with its designated agent and provide updated information with the Secretary of State subverts its claim that the purpose of the laws governing of service of process would be undermined if the default is permitted to stand. In fact, the opposite is true.

In sum, we believe the trial court did not err when it concluded Edentree's own actions constituted inexcusable neglect, barring it from equitable relief.[5]

3. *The Demurrer to Edentree's Four Other Causes of Action*

Next, Edentree argues that even assuming it was not entitled to equitable relief from the default judgment, the court erred in sustaining respondents' demurrer to its other causes of action. Citing to Code of Civil Procedure section 1911, Edentree claims the default judgment on its face did not conclusively bar its other causes of action, which concerned Edentree's rights to the Gale stock under the asset purchase agreement. Edentree also argues the court erroneously declined to consider its second amended

[5] We also note that Edentree's briefs consistently reiterate several misconceptions about the trial court's findings after the bifurcated court trial. For example, in its opening brief, Edentree argues the court erred "by using Edentree's failure to change the Registered Agent as a bar to consideration of Edentree's copious evidence of Gale's extrinsic fraud." This misstates the trial court's findings. In its final decision and findings after the bifurcated trial, the court expressly considered Edentree's claim that Gale committed extrinsic fraud and rejected it. It *also* concluded that Edentree's "inexcusable negligence caused the pleadings to be misdirected by its agent."

We further note that respondents argue on appeal that Edentree was also barred by law from answering, because its corporate status was suspended in both California and Delaware at the time Gale filed its lawsuit. Edentree does not dispute the suspension of its corporate status but claims if it had received notice of the lawsuit it would have revived its corporate status to defend itself against Gale's action. The trial court, however, did not rely or refer to Edentree's suspended corporate status when it determined its inexcusable neglect had caused the default.

complaint, which alleged additional causes of actions. As we explain, we find no merit in Edentree's claims.

a. **Overview and Standard of Review**

" 'A demurrer tests the legal sufficiency of the complaint. [Citation.] Therefore, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] "We treat the demurrer as admitting all material facts properly pleaded, but no contentions, deductions or conclusions of fact or law." [Citation.] The trial court exercises its discretion in declining to grant leave to amend. [Citation.] . . . If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend. [Citation.] The plaintiff has the burden of proving the possibility of cure by amendment.' " (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173.)

b. **The Demurrer Was Properly Sustained**

Here, the trial court applied the doctrine of res judicata and collateral estoppel to conclude the default judgment in Gale's earlier lawsuit against Edentree precluded the first four causes of action in Edentree's complaint. On appeal, Edentree does not question the trial court's legal analysis of the required elements of res judicata and or collateral estoppel. Edentree solely argues that the default judgment provided only that "escrowed assets transferred under the [asset purchase agreement] should be transferred and released to GALE," which does not necessarily refer to the Gale stock at issue in its lawsuit against respondents. Strictly reading this language, Edentree claims the default judgment did not adjudicate the parties' rights over the assets (the shares of Gale stock) that are the subject of its complaint.

Edentree made the same argument below, and the trial court rejected it after concluding that Edentree did not dispute that the shares of Gale stock were the *only* escrowed assets transferred under the asset purchase agreement. On appeal, Edentree

again does not argue that there were other escrowed assets aside from the Gale stock that were transferred to Gale under the asset purchase agreement. As a result, we find the trial court did not err when it concluded the default judgment disposed of the issues surrounding the ownership of the Gale shares, since it appears the shares were the only assets that were placed in escrow by the asset purchase agreement.

For these reasons, Edentree's reliance on Code of Civil Procedure section 1911 is unavailing. Code of Civil Procedure section 1911 provides: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." Edentree insists that the Gale stock shares do not appear on the face of the judgment, but we disagree. The shares are the "escrowed assets transferred under the [asset purchase agreement]." Thus, ownership of said shares were actually adjudged in the default judgment.

Having advanced no other arguments on this subject, we find Edentree fails to establish the court erred when it sustained respondents' demurrer.

c. The Trial Court Did Not Erroneously Strike The Proposed Second Amended Complaint

Edentree argues the trial court erred when it refused to consider its proposed second amended complaint, which it filed after the court had already made its tentative ruling sustaining Gale's demurrer to its four other causes of action. The trial court struck Edentree's proposed second amended complaint after concluding that it was presented with unwarranted delay and that permitting the amendments would greatly prejudice respondents and the court.

Trial courts have wide discretion to allow amendment of pleadings and the exercise of that discretion will not be disturbed unless there is a showing of " ' "manifest or gross abuse of discretion." ' " (*Melican v. Regents of University of California* (2007)

151 Cal.App.4th 168, 175.) "Nevertheless, it is also true that courts generally should permit amendment to the complaint at any stage of the proceedings, up to and including trial." (*Ibid*.) Exceptions to the liberal policy of allowing amendment exist. For example, the policy will not prevail when the opposing party will be prejudiced by the amendment. (*Magpali v. Farmers Group, Inc*. (1996) 48 Cal.App.4th 471, 487.) Additionally, "unwarranted delay in presenting [the amendment] may—of itself—be a valid reason for denial." (*Roemer v. Retail Credit Co*. (1975) 44 Cal.App.3d 926, 939-940.)

Given the circumstances, we do not believe the court's refusal to permit Edentree to file its second amended complaint was an abuse of discretion. Edentree did not lodge the proposed second amended complaint with the court until *after* the court made its tentative ruling granting respondents' demurrer to Edentree's other causes of action. At the hearing contesting the tentative ruling, the court even indicated that it had not been aware that a second amended complaint had been filed. The only explanation given by Edentree's counsel for the late filing was that an amended complaint would have been unnecessary had the court overruled respondents' demurrer. Based on the foregoing, the trial court reasonably concluded the delay in presenting the second amended complaint was unwarranted.

Moreover, we do not believe the trial court abused its discretion by concluding that permitting the amendment would substantially prejudice respondents. The proposed amended complaint, which added allegations that Gale's purportedly fraudulent acts prevented Edentree from discovering Gale's earlier lawsuit, merely rehashed different theories of liability stemming from the issues already litigated and resolved in the bifurcated court trial procedure.

For these reasons, we find the trial court did not abuse its discretion when it sustained Gale's demurrer to Edentree's four causes of action and struck Edentree's belated second amended complaint as improperly filed.

4. *The Motion to Reopen Evidence*

Lastly, we address Edentree's claim that the trial court erred when it denied its posttrial motion to reopen evidence. Edentree insists the motion should have been granted, because its prior counsel stipulated to the bifurcated court trial without live testimony and cross-examination without its consent. Moreover, Edentree insists that Vechery's additional declaration and Nicosia's declaration, which were submitted with its objections to the tentative decision following the court trial, demonstrated both that it had additional evidence demonstrating Gale committed fraud and that its prior counsel was ill-equipped and unprepared to address certain evidentiary issues raised during the court trial. As we explain in detail below, we reject Edentree's claims.

a. **Overview and Standard of Review**

"Trial courts have broad discretion in deciding whether to reopen the evidence." (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208.) A motion to reopen evidence may be granted only if the moving party makes a showing of good cause. (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.) It is proper to deny a motion to reopen evidence if the failure to introduce evidence earlier is a product of trial tactics. (*Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, 1052-1053.) Moreover, "denial of a motion to reopen will be upheld if the moving party fails to show diligence or that he had been misled by the other party." (*Guardianship of Phillip B.* (1983) 139 Cal.App.3d 407, 428.) We review a trial court's denial of a motion to reopen evidence for an abuse of discretion. (*Horning, supra,* at p. 208.)

b. **The Waiver of Live Testimony and Stipulation to The Bifurcated Court Trial Proceedings Did Not Impair Edentree's Substantial Rights**

First, we address Edentree's claim that its motion to reopen evidence should have been granted because its counsel agreed to the bifurcated court trial procedure excluding live testimony without its consent. Edentree argues that due to its prior counsel's unauthorized actions, it should be entitled to present new evidence—live testimony and appropriate cross-examination of witnesses—to the trial court.

In its order denying Edentree's motion to reopen evidence, the trial court expressly found that "neither party was deprived of the opportunity for cross-examination or the right to present testimony at trial, as depositions were taken before the trial, and that deposition testimony as well as testimony presented by affidavit was presented to the Court for consideration." Moreover, the court concluded that Edentree itself "chose not to cross-examine any witness despite given the opportunity to do so." Thus, the trial court held Edentree's substantial rights were not impaired by the trial procedures that were stipulated to by its counsel.

The distinction between decisions that impair a client's substantial rights and those that do not determine whether an attorney must have his or her client's express consent to act. Not all attorney actions require a client's express consent. An attorney is " 'authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action . . . . "In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client." ' " (*Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 403-404.)

For example, "an attorney may bind his or her client with respect to procedural matters by entering into stipulations or taking other action such as (1) stipulating to the use of a witnesses' prior-trial testimony in a subsequent action [citation]; (2) making the tactical decision (as plaintiff's counsel) to exonerate a codefendant, because it was the best opportunity 'to fortify potential recovery from the other' defendant [citation]; (3) abandoning a nonmeritorious defense [citation]; (4) refusing to call a witness notwithstanding the client's contrary wishes [citation]; (5) stipulating to a trial judge's view of the premises [citation]; (6) stipulating that a witness, if called, would offer the same testimony as another witness who already testified [citation]; and (7) stipulating to the prosecution's due diligence in attempting to locate a witness and the use of the unavailable witness's preliminary examination testimony." (*Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1581-1582.)

Citing *Linsk v. Linsk* (1969) 70 Cal.2d 272 (*Linsk*), Edentree argues that its substantial rights *were* impaired. In *Linsk*, the California Supreme Court held that "[i]f counsel merely employs his best discretion in protecting the client's rights and achieving the client's fundamental goals, his authority to proceed in any appropriate manner has been unquestioned. On the other hand, if counsel abdicates a substantial right of the client *contrary to express instructions*, he exceeds his authority." (*Id.* at p. 278, italics added.) For example, "[i]t seems incontrovertible that the right of a party to have the trier of fact observe his demeanor, and that of his adversary and other witnesses, during examination and cross-examination is so crucial to a party's cause of action that an attorney cannot be permitted to waive by stipulation such right as to all the testimony in a trial *when the stipulation is contrary to the express wishes of his client*." (*Id.* at pp. 278-279, italics added.) Thus, in *Linsk*, the California Supreme Court determined that the attorney lacked the authority to stipulate, over his client's objection, that the matter could be decided solely on the record from a previous trial that ended in a mistrial. (*Ibid.*)

Analogizing its case to *Linsk*, *supra*, 70 Cal.2d 272, Edentree opines its counsel's allegedly unauthorized actions amounted to a waiver of *all* live testimony before the trier of fact, an act that is decidedly *not* procedural in nature. Thus, it argues the court erroneously concluded that its counsel made procedural decisions that were binding on it even absent its express consent. We disagree and find the trial court did not err when it concluded that under the unique circumstances presented in this case, Edentree's counsel made tactical decisions that did not implicate Edentree's substantial rights.

First, we find that *Linsk* is factually distinguishable. In *Linsk*, the attorney stipulated, over his client's objection, to permit a trial judge to decide the merits of a divorce case solely on the record in the previous trial that had ended in a mistrial. (*Linsk*, *supra*, 70 Cal.2d at pp. 275-276.) In holding that the attorney's act of waiving all live testimony impaired the client's substantial rights, the California Supreme Court noted that the "right to trial contemplates the 'right to be present at and to participate in every phase of the trial.' " (*Id*. at p. 279.) Moreover, the trial judge's personal observation of witnesses was particularly important in the context of the divorce case at issue in *Linsk*, because "both parties prayed that the court grant them a divorce and each testified to acts of extreme cruelty by the other during the course of the marriage." (*Ibid*.) Thus, the California Supreme Court determined the plaintiff was "entitled to a decision upon the controverted facts from the judge who heard the evidence, absent a waiver of that right." (*Ibid*.)

The California Supreme Court in *Linsk* expressly stated that credibility determinations were especially important given the context of the case. Here, counsel for both parties indicated during the bifurcated court trial proceeding that they did not generally have any issues with the credibility of the witnesses who had submitted declarations. In fact, respondents' attorney was the only one who stated that he had issues with many of the declarants' credibility. As we noted earlier, respondents'

attorney specifically stated that he doubted the credibility of Vechery's statement that Edentree had no employees between May 2008 to December 2009. Ultimately, however, respondents' attorney determined that the issue was not materially relevant to the court's consideration of Edentree's cause of action. Edentree's attorney made no such comments at the bifurcated court trial proceeding.

The nature of the evidence presented here compared to *Linsk* is also decidedly different. Unlike in *Linsk*, Edentree and respondents were not arguing over the credibility of witnesses. The facts set forth in the parties' declarations did not contradict each other. Although the parties disputed what *inferences* the court should make based on the facts presented, they did not dispute the facts themselves.[6]

Moreover, *Linsk* in part concluded that the right to live testimony was an extension of a plaintiff's rights to have a decision be made upon the controverted facts by a trier of fact who has heard the evidence and to be present at and participate in every phase of the trial. (*Linsk*, *supra*, 70 Cal.2d at p. 279.) In *Linsk*, foregoing live testimony by having a judge decide the case solely on the record in the previous trial deprived the plaintiff of these rights. The first judge in *Linsk* made certain credibility determinations, likely based on the demeanor of witnesses, and having the second judge decide the matter on the written record would deny him or her of the same factfinding ability. In contrast, Edentree's right to have the trier of fact who would render the judgment hear the evidence and its right to participate in the trial proceedings were not circumvented by the stipulated procedure in this case. As noted by the trial court when it denied Edentree's motion, Edentree was given the opportunity to present written testimony. It was also

[6] As we noted earlier in our recitation of the facts, Edentree later argued in its motion to reopen that it had evidence that contradicted some of the declarations provided by respondents. We address Edentree's attempt to introduce this additional evidence later in this opinion.

afforded the opportunity to cross-examine witnesses if it chose to do so. Thereafter, the trial court rendered its decision after considering the evidence presented by the parties.

In sum, the stipulated procedure in this case did not impair Edentree's substantial rights. The manner of cross-examination, what evidence to be introduced, and whether evidentiary objections should be made are all decisions of ordinary trial tactics that attorneys have authority to make on behalf of their clients. (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138.) As noted in *Linsk*, courts have held that an attorney may "refuse to call a witness even though his client desires that the witness testify [citation]; . . . may stipulate . . . that a witness, if called, would give substantially the same testimony as a prior witness [citation] and that the testimony of a witness in a prior trial be used in a later action." (*Linsk*, *supra*, 70 Cal.2d at p. 277.) Here, Edentree's counsel reviewed the written evidence, strategically decided live testimony was unnecessary, and further decided that additional cross-examination of potential witnesses was not beneficial to its client's case.[7]

In conclusion, we find the trial court did not err when it concluded, based on the specific factual circumstances presented here, that Edentree's trial counsel did not impair its substantial rights when it stipulated to the bifurcated court trial procedure.

[7] As respondents note, Greenberg Traurig, Edentree's former counsel, filed a motion to quash Edentree's trial subpoena. Thereafter, Edentree's counsel stipulated to the bifurcated court trial procedure on Edentree's behalf. This also supports our conclusion that Edentree's counsel was acting strategically. It is possible that Edentree's counsel determined that the motion to quash had merit, and it would be unable to call the witnesses it had originally intended.

c. The Trial Court Did Not Err in Concluding The New Evidence Was Not Presented with Sufficient Diligence

Even if we assume Edentree's substantial rights had been impaired by its counsel's stipulation, we would still conclude that the trial court did not abuse its discretion when it determined that Edentree failed to show good cause and diligence.

In general, good cause must exist for a court to grant a motion to reopen. It is appropriate to deny a motion to reopen evidence if the newly introduced evidence would not have changed the outcome of the trial. (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222 [not an abuse of discretion to deny motion to reopen evidence if new evidence would not change the outcome].) It is also appropriate to deny a motion to reopen evidence if the moving party fails to show diligence. (*Estate of Horman* (1968) 265 Cal.App.2d 796, 807.) In its order denying Edentree's motion, the court determined that the new evidence Edentree sought to introduce was "cumulative at best" and that the allegedly new evidence was and had always been within Edentree's control. In other words, the court impliedly found that introducing the evidence cited in Edentree's motion to reopen would not have changed the outcome of the bifurcated trial.

We conclude that the trial court's conclusion was reasonable. Edentree does not specify the witnesses it wishes to elicit live testimony from and does not explain how their testimonies would differ from their written declarations. Respondents argue that to its knowledge, Edentree did not depose any of Gale's former employees, including Rains, and it had only subpoenaed as witnesses its own former attorneys at Greenberg Traurig, who had filed a motion to quash.

In its motion to reopen evidence, Edentree described, in broad strokes, the new evidence it would have introduced. First, Edentree vaguely claimed that the bifurcated court trial proceeding "prevented Edentree from offering or eliciting important evidence, including without limitation evidence that Gale officers and employees deliberately chose, or were instructed, to ensure that Edentree never received actual notice of the Gale

matter of the judgment entered therein." It is not entirely clear what Edentree is referencing in this statement, but it is likely citing to Vechery's second declaration, filed after Edentree substituted in new counsel. In Vechery's second declaration, he asserted that he knew that Gale purposefully concealed its lawsuit from Edentree, explaining that "Edentree understands that Rains [Gale's CFO] told Horwitz [Edentree's trial counsel] that Rains told Geibelson [Gale's attorney] that Rains had received legal documents in the Gale Matter that were addressed to Edentree and that Geibelson told Rains not to send the legal documents to Edentree or to me on behalf of Edentree."

Second, during the hearing on the motion to reopen evidence, Edentree's counsel further stated that the "glaring void" created by the lack of live testimony was the absence of testimony from "the lawyers" (presumably, Gale's attorneys), who perpetrated the fraud on Edentree when they failed to give actual notice to Vechery when they were dealing with him "on this very issue." In this context, we believe Edentree's counsel is referring to the fact that Gale's attorneys made no mention to Edentree's attorneys of its lawsuit against Edentree when it was communicating with Edentree about its petition for writ of mandate.

Lastly, Edentree argues that it could have presented additional evidence that it had not known until April 2015, after the bifurcated court trial, that Gale had sued the VFT in its earlier lawsuit and surreptitiously dismissed the VFT in lieu of serving it with the summons and complaint in order to prevent Edentree from obtaining actual notice.

We agree with the trial court's conclusion that the purportedly new evidence was largely cumulative and contained materials that were already within Edentree's possession. Vechery had previously submitted a declaration, and Edentree does not dispute that Nicosia's declaration and the documentary evidence attached to his declaration, such as the correspondence between Edentree and Gale's respective attorneys, were not readily available to its former counsel. Moreover, Edentree's claim

that it was not aware that Gale dismissed the VFT from its lawsuit appears to be without merit. Respondents submitted documents that showed it dismissed the VFT from its lawsuit as an exhibit to its request for judicial notice in support of its demurrer to Edentree's complaint, which was filed well before the bifurcated court trial. Thus, it is reasonable to infer, like the trial court did, that Edentree's attorney decided not to introduce certain evidence as a matter of trial tactics.

Additionally, Edentree's continued focus on whether Gale's counsel failed to inform its former trial counsel about the impending default ignores the trial court's conclusion that Gale's counsel only had an ethical obligation to warn Edentree. The trial court determined that Gale's attorneys were under no legal obligation to provide Edentree with an express warning. In other words, even if there was evidence that Gale's attorneys purposefully decided not to mention the lawsuit to Edentree's attorneys, this omission did not constitute extrinsic fraud. Based on the foregoing, the trial court reasonably concluded that the introduction of the evidence would not have changed the outcome of the bifurcated court trial and was largely cumulative.

As a result, we find the trial court did not abuse its discretion when it denied Edentree's motion to reopen evidence.

5. *The Fee Order*

Edentree makes several arguments pertaining to the propriety of the court's posttrial fee order. First, Edentree insists that the superior court's findings in its fee order that "Edentree unnecessarily increased the cost of litigation" and "made the case more complicated than was warranted or appropriate" cannot stand and must be reversed. Edentree, however, does not provide reasoned arguments supporting its claim that the trial court's fee order contained erroneous statements. We therefore treat this perfunctory claim as waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [issue can be forfeited by failing to provide reasoned legal argument].)

Second, Edentree claims that if we reverse the trial court's judgment, the order granting fees must also be reversed. Edentree makes no other argument pertaining to the propriety of the fees, such as the amount of the fees awarded. Since we do not reverse the trial court's judgment, this additional argument also fails.

Accordingly, we affirm the trial court's order awarding respondents their fees.

DISPOSITION

The judgment and the order awarding attorney fees to respondents are affirmed. Respondents are entitled to their costs on appeal.

Greenwood, P.J.

WE CONCUR:

Elia, J.

Grover, J.

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